



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Executive Closers, Inc.

File: B-259848

Date: April 6, 1995

John M. Giblin, Esq., Lommen, Nelson, Cole & Stageberg, P.A., for the protester.
Virginia Kelly Stephens, Esq., Department of Housing and Urban Development, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging improper downgrading of protester's experience is denied where the agency's determination was reasonably based on the protester's poor performance record under past contracts.
2. Agency reasonably awarded contract to a higher-priced offeror which had a better past performance record where experience in real estate closings was a heavily weighted evaluation factor and the price/technical tradeoff was reasonable and consistent with the solicitation's evaluation scheme.

DECISION

Executive Closers, Inc. protests the award of a contract to Closers Finalis Inc. under request for proposals (RFP) No. 009-94-092, issued by the Department of Housing and Urban Development (HUD). The protester challenges the agency's evaluation of its experience and the award to a higher-priced offeror.

We deny the protest.

BACKGROUND

The agency issued the RFP on October 14, 1994, seeking proposals for an indefinite quantity contract for a base year with 2 option years to provide real estate closing services for HUD-owned properties in Hennepin County, Minnesota. Section M of the RFP provided that technical factors were more important than price, but that price would

play a significant role in the award selection. Award was to be made to the responsible offeror whose proposal was determined to be most advantageous to the agency.

The RFP set forth a 100-point technical evaluation scheme under which demonstrated experience in closing single family real estate sales in Minnesota was worth 40 points. In this regard, the RFP required that offerors with HUD closing experience in the past 5 years submit a complete list of all HUD contracts in effect during that time, including the name and phone number of the HUD contact person.

Six offerors submitted proposals by the November 14 closing date. With respect to the past performance data, Executive Closers's proposal identified four closing service contracts that it had performed for HUD in Minnesota from 1986 to the present, including a contract for closing services for Hennepin County. Closer Finalis's proposal identified one HUD closing service contract for Anoka County, Minnesota, under which it had been performing since 1992.

Initially, Executive Closers's proposal received a total technical score of 83.24 points and Closers Finalis's proposal received 73.75 points. This evaluation was based on the volume of experience only, with the agency noting its intention to review performance files prior to reaching a final assessment which would take into account the quality of the experience. Based on the results of the initial evaluation, the agency determined to include all six proposals in the competitive range. Upon reviewing the contract performance data of offerors that had performed HUD contracts, the agency concluded that Closers Finalis's performance was satisfactory, but that Executive Closers's performance under its current contract was less than satisfactory. The evaluators determined that the agency had encountered numerous problems with Executive Closers that took a significant amount of HUD staff time to resolve. For example, the agency record reflected that Executive Closers had requested payment in September for a closing that had been canceled in April; the agency had notified Executive Closers that it, in a number of instances, had failed to send out a 10-day warning letter when a closing date had not been established, and Executive Closers's performance record contained many responses by Executive Closers relating to various performance problems raised by the agency.

Based on this information, the agency's discussion letter to Executive Closers contained the following:

"Note to Offeror: The Source Evaluation Board reviewed Executive Closers contract performance files and found numerous incidents of HUD having to request correction to an error and/or question

two and three times. It appears that Executive Closers has required more administrative attention than other HUD closers, yet Executive Closers has been under HUD formal contract longer than any [of the] other Mpls HUD closers. The Mpls HUD office has received numerous complaints from buyers, realtors, property managers, and/or lenders concerning rudeness displayed by Executive Closers staff.

"It is an unwritten and given fact that the Department expects its contractors to display friendly and excellent customer service to all clients."

Executive Closers's BAFO contained the following:

"As far as all the problems I have caused HUD, I am very sorry. Any complaints that have been brought to my attention I have responded to and I think things have improved since Pat's letter dated September 27, 1994. . . . If we are awarded this contract we will work hard on an attitude adjustment."

The BAFOs of the awardee and the protester were evaluated as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>BAFO, Price¹</u>
Closers Finalis	82.75	\$465
Executive Closers	68	\$450

The agency determined that Closers Finalis offered the greatest value to the government, due to its technical superiority, and that these advantages were worth payment of the small price premium. The agency made award to Closers Finalis. This protest followed.

Executive Closers objects to the agency's evaluation of its past performance under HUD contracts, and points out that it has performed approximately 6,000 closings for HUD to date, compared to the awardee's 1,000 HUD closings. Executive Closers contends that none of the alleged problems cited by HUD prevented any closings from occurring, and there is no evidence that HUD lost any money from their handling of the approximately 6,000 closings that it has handled for HUD to

¹Each offeror was to submit a fixed price per closing for each contract year. This figure is the total of each offeror's per closing cost for the base year and the 2 option years, which the RFP indicated would be used to determine price.

date. In sum, the protester contends that it has "satisfactorily established a commendable track record with HUD based upon this prior performance," and that it should have received the award due to its extensive experience with HUD and the fact that it was the lowest-priced offeror.

The evaluation of technical proposals is primarily within the discretion of the contracting agency; we will review an evaluation only to ensure that it is reasonable and consistent with the evaluation scheme. See Electrolux SARL, B-248742, Sept. 21, 1992, 92-2 CPD ¶ 192; CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454.

Executive Closers asserts that, in some instances, HUD relied on erroneous evidence when evaluating its past performance. In other instances, Executive Closers seems to concede that there have been problems with HUD, but that it attempted to address these problems in a timely manner. Its performance record contains some explanations or denials by Executive Closers concerning performance problems raised by HUD. For example, in response to HUD's notice that Executive Closers had requested payment in September for a closing that had been canceled in April, Executive Closers stated that one employee took extensive vacation leave that summer and that the paperwork for the April cancellation was not ready for the June billing, and that because it had no cancellations in July, the April cancellation was included in the September billing for August. Executive Closers also stated that it failed to send out 10-day warning letters due to a computer malfunction.

We find nothing improper in the evaluation by the agency of Executive Closers's past performance. While the record contains Executive Closers's general denials of statements contained in its performance records, as well as explanations and interpretations of events that provide mitigating circumstances for certain of Executive Closers's shortcomings, there is nonetheless, a record containing sufficient evidence for HUD to conclude that the firm had a series of performance problems under HUD contracts. An agency's evaluation of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts. See Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151.

Executive Closers also argues that it is unfair to compare its performance record to Closers Finalis's, since it has performed 6,000 closings for HUD compared to Closers Finalis's 1,000 HUD closings, and that the high number of closings that it handled "would in all probability generate a higher number of complaints." While Executive Closers's

extensive experience was taken into consideration, the record provides no basis for HUD to assume that Closers Finalis would have had the same number of performance problems as Executive Closers, had it performed the same number of HUD closings. See Kings Point Indus., Inc., B-249616, Dec. 7, 1992, 92-2 CPD ¶ 395. On the contrary, Closers Finalis's performance record simply indicates that it does not experience either the kind or volume of problems that characterize Executive Closers's performance. Accordingly, we have no basis to object to the evaluation of the offeror's HUD closing experience.

Finally, while the protester argues that as the low-priced offeror, it was entitled to the award, the RFP did not require the award to be made to the offeror with the lowest-priced, technically acceptable proposal. Rather, the RFP stated that the award would be made to the offeror whose proposal, conforming to the RFP, was deemed most advantageous, i.e., the best value, to the government, with technical evaluation factors being considered more significant than price. Patricia A. Geringer, B-247562, June 11, 1992, 92-1 CPD ¶ 511.

Where the RFP does not provide for the award on the basis of the lowest-priced, technically acceptable proposal, an agency has the discretion to make the award to an offeror with a higher technical score and a higher price where it reasonably determines that the price premium is justified considering the technical superiority of the awardee's proposal and the result is consistent with the evaluation criteria. Id.; General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Here, while Closer Finalis's price was approximately 3.5 percent higher than the protester's price, the agency reasonably concluded that Closers Finalis's significantly higher technical score warranted payment of this small price premium.

The protest is denied.

\s\ Michael R. Golden
for Robert P. Murphy
General Counsel